Supreme Court, U.S.
FILED
NOV 29 1999

No. 99-662

IN THE
Supreme Court of the United States

EDWARD J. SHOEN, *et al.*,
Petitioners,

v.

SAMUEL W. SHOEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

JOHN G. ROBERTS, JR. *
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

RICHARD M. AMOROSO
U-HAUL INTERNATIONAL, INC.
2727 North Central Avenue
Suite 1100
Phoenix, Arizona 85036
(602) 263-6977

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

Bursch v. *Beardsley & Piper*, 971 F.2d 108 (8th Cir. 1992) 3, 5

In re Fesco Plastics Corp., 996 F.2d 152 (7th Cir. 1993) 5

In re Pardee (Great Lakes Higher Educ. Corp. v. *Pardee)*, —— F.3d ——, 1999 WL 965651 (9th Cir. 1999) 5-6

In re Seal, 192 B.R. 442 (W.D. Mich. 1996) 3

Pennsylvania v. *Union Gas Co.*, 491 U.S. 1 (1989) .. 4

Seminole Tribe of Fla. v. *Florida*, 517 U.S. 44 (1996) 4

Statutory Provision:

11 U.S.C. § 502(b)(2) ..... *passim*

IN THE

Supreme Court of the United States

No. 99-662

EDWARD J. SHOEN, *et al.*,
Petitioners,

v.

SAMUEL W. SHOEN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

Respondents concede that "[e]veryone * * * agrees that Section 502(b)(2) does not generally permit" postpetition interest on unsecured claims. Opp. 3. They also concede that "[e]veryone further agrees that money judgments generally constitute unsecured claims." Opp. 3. But in a twist worthy of an O. Henry short story, respondents conclude that they *are* entitled to postpetition interest on *their* unsecured money judgment. Here, however, respondents' *non sequitur* produces not literature, but a $55 million legal error.

1. Respondents' concessions essentially mirror Judge McKeown's analysis in dissent below:

> The rule is clear: the Bankruptcy Code prohibits postpetition interest on unsecured claims. 11 U.S.C. § 502(b)(2). The Arizona judgment is an unsecured claim. The interest accrued on the judgment after the filing of the bankruptcy is postpetition interest. What then is the majority's basis for deviating from the rule? [Pet. App. 6a-7a.]

Nothing in respondents' brief provides a convincing answer to this question.

Respondents' theory as to why Section 502(b)(2) does not apply in this case is that "if Petitioners wanted to acquire Respondents' AMERCO stock, they could only do so by complying with the only state law granting them a right to acquire such stock—the Judgment. Even in bankruptcy, one may not acquire new property without paying the seller the amount he is entitled to for the property under state law." Opp. 4. There are only two things wrong with this theory: the facts and the law.

As to the facts: respondents make it seem as if petitioners, after seeking bankruptcy protection, exercised some sort of an option to buy respondents' stock. But that is not at all what happened. The Arizona state court had ruled that respondents could not both accept a money judgment on their claims *and* keep their stock because that would result in a double recovery. *See* Pet. 4.[1] Thus, petitioners were not buying respondents' stock for a fixed price; respondents had to surrender their shares in

---

[1] As noted in the petition, the state court's double recovery ruling was not challenged by respondents and is not at issue here. *See* Pet. 4 n.1. Respondents do not contend otherwise in their brief in opposition.

AMERCO if they wanted to secure a money judgment in the amount of $462 million, as it happened. And although the state court awarded respondents interest on the judgment, their right to collect that interest was trumped by Section 502(b)(2). *See, e.g., Bursch* v. *Beardsley & Piper*, 971 F.2d 108, 113-114 (8th Cir. 1992) (applying Section 502(b)(2) to disallow judgment interest) (discussed at Pet. 12-13, 19).

As to the law: respondents assert that "[e]ven in bankruptcy, one may not acquire new property without paying the seller the amount he is entitled to for the property under state law." Opp. 4. But bankruptcy law can have precisely that effect when postpetition interest is involved. In *In re Seal*, 192 B.R. 442 (W.D. Mich. 1996), for example, the debtors had agreed to pay the seller of an automobile 10% interest on the unpaid balance of the purchase price. But the court held that the debtors obtained "free and clear" ownership of the vehicle (*id.* at 458) by paying the principal balance and the interest that accrued prior to bankruptcy but without having to pay any postpetition interest. *See* Pet. 17-18.

Respondents attempt to distinguish *Seal* on the ground that the debtors there "had acquired the vehicle *before* filing bankruptcy" and thus the case "did not involve a debtor's attempt to obtain *new* property in bankruptcy." Opp. 7 (emphasis added). And respondents contend that here "Petitioners could only acquire *new* property in bankruptcy * * * in accordance with state law." Opp. 2 (emphasis in original). But the supposed newness of the stock to petitioners is beside the point. What is relevant under bankruptcy law is that petitioners' obligation to pay judgment interest—like the *Seal* debtors' obligation to pay interest—arose *before* they filed for bankruptcy.

Thus, the interest on the Arizona judgment was subject to Section 502(b)(2) once it became postpetition interest.

2. Respondents attempt to frame the issue in this case as whether the state court judgment should be characterized as "a judicially-mandated sale of stock." Opp. 3. But that characterization of the judgment (found at Pet. App. 25a) blinks reality. To the naked eye—even a legally-trained one—the Arizona judgment appears, as Judge McKeown said, to be nothing more than "a straightforward state court judgment for damages." Pet. App. 6a.[2] But, even more fundamentally, it is totally irrelevant whether the judgment can be seen as "a judicially-mandated sale of stock" because nothing exempts such judgments from the rule against postpetition interest. There is no judicially-mandated-sale-of-stock exception to Section 502(b)(2). *See* Pet. App. 5a (McKeown, J., dissenting) (finding "no magic in the nature of the Arizona judgment that removes it from the general rule disallowing postpetition interest on unsecured claims"). Congress specified the exceptions to Section 502(b)(2), and an exception for judgments involving the sale of stock is not among them. The Ninth Circuit erred in assuming the authority to expand on Congress' design.

3. Respondents intone repeatedly that this case is "unusual" (Opp. 1, 4, 5, 7), as if only run-of-the-mine cases are appropriate for review by this Court. But the pertinent facts are not out of the ordinary. Respondents recovered an unsecured state court money judgment in-

---

[2] Respondents tout the fact that "[s]ix of the seven judges who have examined this issue below agreed" with their characterization of the judgment. Opp. 3. But this Court rightly eschews the "judicial headcount" approach to legal analysis. *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 8 n.2 (1989), *overruled on other grounds, Seminole Tribe of Fla.* v. *Florida*, 517 U.S. 44 (1996).

cluding interest thereon. The only twist is that the judgment also required them to surrender certain stock in order to avoid a double recovery—but that aspect of the judgment is irrelevant to the postpetition interest issue. The most unusual thing about this case is that the Ninth Circuit, in the teeth of Section 502(b)(2), awarded respondents postpetition interest on an unsecured claim. Had the Ninth Circuit denied them postpetition interest, that would have seemed a very routine application of Section 502(b)(2). *See Bursch* v. *Beardsley & Piper, supra*; Pet. 12-13 (citing *Bursch* and other cases denying postpetition interest on judgments). Thus, the facts of this case are not particularly unusual—only the Ninth Circuit's refusal to apply Section 502(b)(2) to those facts is.

4. Respondents claim that "[t]he Ninth Circuit did not create an exception to Section 502(b)(2) here." Opp. 6. But that is not how Judge McKeown saw it, *see* Pet. App. 6a (the majority "creat[es] an unprecedented exception to the rule" against postpetition interest), and there is no other explanation for the Ninth Circuit's decision. Therefore, the decision below conflicts with *In re Fesco Plastics Corp.*, 996 F.2d 152, 156 (7th Cir. 1993), which holds that "[f]or a bankruptcy court to create a new exception [to Section 502(b)(2)] would go beyond [its] authority." *See* Pet. 14-15.

5. Finally, respondents assert that the rule against postpetition interest is "alive and well in the Ninth Circuit" (Opp. 6), but they cite only one Ninth Circuit case decided after the decision below that mentions Section 502(b)(2), and that case, in fact, embraces the view that "postpetition interest on a student loan debt is *nondischargeable.*" *In re Pardee (Great Lakes Higher Educ. Corp.* v. *Pardee)*, —— F.3d ——, 1999 WL 965651, at

*1 n.4 (9th Cir. 1999) (emphasis added). And the particular manner in which the Ninth Circuit elects to apply its newly-minted exception to Section 502(b)(2) is of less concern than the fact that the court has undermined the even-handedness and predictability essential to bankruptcy law by creating an exception in the first place.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN G. ROBERTS, JR. *
DAVID G. LEITCH
H. CHRISTOPHER BARTOLOMUCCI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5810

RICHARD M. AMOROSO
U-HAUL INTERNATIONAL, INC.
2727 North Central Avenue
Suite 1100
Phoenix, Arizona 85036
(602) 263-6977

* Counsel of Record

Counsel for Petitioners